IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3161 of 1996
With
SPECIAL CIVIL APPLICATION No. 9310 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BI MEHTA - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR PARESH UPADHYAY for Petitioner(s) : 1,
MR KETAN DWIVEDI, ASST GOVERNMENT PLEADER for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 30/07/2007

COMMON ORAL JUDGMENT

1. The petitioner has preferred these petitions under Article 226 of the Constitution of India challenging the

denial of higher pay scale pursuant to the scheme dated 05.07.91 revised dated 16.08.94 and not granting him the benefit of fitment provided under Rule 41-A(1) of the Bombay Civil Services Rules, 1959(hereinafter referred to as the BCSR).

2. The counsel for the parties have requested to take up both the petitions for final disposal as the question involved are inter spliced and therefore both these petitions are being taken up for hearing together and are disposed of by this common judgement.

3. The facts in brief in both these petitions deserve to be set out as under:

3.1 The Special Civil Application No. 3161/96 was filed by the petitioner mainly agitating that the higher grade scale under the scheme of higher grade scale floated vide resolution dated 05.07.91 revised dated 16.08.94 be accorded to him. During pendency of this petition the second petition being Special Civil Application No. 9310/01 came to be filed by the petitioner seeking benefit of fitment in his pay scale under Rule 41-A(1) of the BCSR.

3.2 The petitioner was appointed as Junior Technical

Assistant(hereinafter referred to as JTA for the sake of brevity) on 16.11.85 in the pay scale of 425-700 in the office of Director of Insurance, State of Gujarat. The petitioner was promoted to the post of Senior Technical Assistant (hereinafter referred to as STA for the sake of brevity) with effect from 30.12.99. It deserves to be noted that the post of JTA was in the pay scale of 425-700. From the post of JTA, the promotion was available to the post of STA in the pay scale of Rs. 500-900. The pay scales of JTA were revised by Gujarat Civil Services (Revision of Pay Scales), 1987 with effect from 01.01.86 from Rs. 425-700 to Rs. 1400-2300 and the pay scales of STA were revised from Rs. 500-900 to Rs. 1640-2900. The State further revised the pay scale of JTA vide notification dated 20.03.91.

3.3 As per this notification the scale of JTA was revised from Rs. 1400-2300 to Rs. 1640-2900. However the effect of this revision was also given from 01.01.86 as it happened in the case of Assistants in Secretariat. Thus because of the further revision of the scale of JTA they were drawing their pay in the scale which was equivalent to that of STA. Therefore the State combined the cadre of JTAs and STAs and re-designated them as Insurance Assistants. The notification dated 20.03.91 is on page 31 and 35 to the petition being SCA No. 3161/96.

3.4 The State issued resolution dated 08.10.90 restoring the earlier position of two cadres which was re-designated as Insurance Assistant. Now because of this bifurcation and restoration of earlier position two cadres came into being namely JTA and STA. The State provided scale of Rs. 1400-2300 only to the post of JTA. However, the JTA who had already availed the pay scale of Rs. 1640-2900 were permitted to draw their pay in the same scale i.e RS. 1460-2900 and the continuation of pay of salary in the scale of Rs. 1640-2900 was treated as personal scale to them. The new incumbents in the post of JTA were to be recruited in the scale of Rs. 1400-2300 only. It deserves to be noted that the petitioner had availed the benefit of the revision which was effected vide notification dated 20.03.91 and accordingly he continued drawing the salary in the pay scale of Rs. 1640-2900 in accordance with the provision of resolution dated 08.10.91.

3.5 The State promulgated a scheme of higher grade scale alleviating the feeling of frustration amidst the employees who had not received promotion and stagnated in the same scale for the period of 9, 18 and 27 years. The scheme was promulgated vide resolution dated 05.07.91 which was revised vide resolution dated 16.08.94. As per

the said scheme, the employee who has been stagnating in the same pay scale for 9 years without any promotion were to be given benefit of higher grade pay scale of the promotional post and while giving the scale they were also declared entitled to the benefit of fitment as per Rule 41-A(1) of the BCSR.

3.6 The petitioner like other JTAs was receiving benefit of pay revision vide notification dated 20.03.91 and he received pay scale of Rs. 1640-2900. The said benefit coupled with the restoration of the cadre of JTA and STA was withdrawn so far as the new recruits were concerned as per the resolution dated 08.10.91. However, as per the resolution dated 08.10.91 the JTAs like the present petitioner were permitted to be continued in the pay scale of Rs. 1640-2900 and payment in that scale was treated to be their personal scale. The petitioner therefore filed petition being SCA No. 3161/96 interalia for getting benefit of higher grade pay scale.

3.7 During pendency of this petition, the petitioner had to file another petition being SCA 9310/01 as he came to be promoted in the meantime to the post of STA wherein also he continued receiving his salary in the pay scale of Rs. 1640-2900. The petitioner was promoted to the post of STA with effect from 30.12.99. The petitioner

was denied the benefit of fitment under Rule 41-A(1) of the BCSR even after his regular promotion on 30.12.99.

4. Mr Upadhyay, learned advocate appearing for the petitioner has fairly conceded that in both these petitions the challenge is confined to denial of the benefit of fitment provided under Rule 41-A(1) of the BCSR. Mr Upadhyay has conceded that the petitioner is not entitled to get benefit of higher pay scale of Rs. 2200-4000 under the scheme. He has submitted that if the petitioner is getting benefit of fitment under Rule 41-A(1) on the date of his completion of 9 years of service in the scale of Rs. 1640-2900 then his grievance in both these petitions would be redressed.

4.1 Mr Upadhyay has contended that a similar anomaly had arisen in the case of Deputy Directors and Joint Directors in the Gujarat Accounts Services-Class I. The Joint Director of Accounts and Treasuries, Examiner Local Funds Accounts were in the pre-revised scale of Rs. 3000-5000 and the Deputy Director, Deputy Examiners, Account Officers, Senior Treasury Officer were in the pay scale of Rs. 3000-4500. The effect of pay revision in case of these two cadres was that both these cadres were placed in the pre revised scale of Rs. 10000-15000 and therefore though the promotion from the post of Deputy Director was

available to that of Joint Director on promotion, the scale remained the same. The benefit of fitment envisaged under Rule 41-A(1) of the BCSR had not been granted to this cadre also. The benefit of fitment was denied as per resolution dated 18.11.99 wherein it was provided that in cases where the promotional posts and fidder posts are in the same pay scale because of the introduction of pay revision the benefit of fitment under Rule 41-A(1) was not to be granted as the cadres were deemed to have been merged. However, it was clarified that the employees promoted before 01.01.96 would be entitled for fitment as per Rule 41-A(1) of the BCSR.

5. The State issued resolution dated 17.03.05 stating that so far as the post of Deputy Director and Joint Director in the Gujarat Accounts Services Class-I are concerned there are administrative difficulties in treating them to be merged posts and cadre and therefore they have to be treated as separate cadres. Therefore it was resolved that the benefit of fitment envisaged under Rule 41-A(1) of the BCSR is admissible to officers who have been promoted to the post of Joint Director from the post of Deputy Director. Mr Upadhyaya has submitted that this benefit which is now made admissible to the Joint Directors vide resolution dated 17.03.05 ought to have been extended to the persons like the present petitioner

also, as in their case also merging of cadre was revoked and the cadres were treated to be separate cadres vide resolution dated 08.10.91.

6. Mr Ketan Dwivedi, learned AGP submitted that the petitioner is not entitled to higher pay scale of Rs. 2200-4000 and the benefit of fitment under Rule 41-A(1) is also not admissible to him in view of the fact that he is in the same pay scale and as per the resolution dated 18.11.99 he cannot be granted the same benefit. He further submits that the reliance placed on the decision passed by this Court in the case of Munshi B Pranlal vs. State of Gujarat in Special Civil Application No. 4730 of 1984 is of no avail as the facts of both the cases are different.

6.1 Similarly, he submits that the case of Deputy Director who has been granted the benefit of Rule 41-A(1) as per the resolution at page 50 dated 17.03.05 also cannot be equated with that of the present petitioner as even they have been granted benefit only with effect from 1996. He has submitted that therefore the petition deserves to be dismissed.

7. This Court has heard learned counsel appearing for the respective parties and perused the Record &

Proceedings. It deserves to be noted that the JTAs like the present petitioner were infact brought at par in the matter of pay scale with STAs which was a promotional post and it is a promotional post as on today also. The notification dated 20.03.91 unequivocally provided for merging of two cadres and a combined cadre was re-designated as Insurance Assistants. Both these cadres were in the pay scale of Rs. 1640-2900. The Finance Department, Government of Gujarat issued another resolution dated 08.10.91. Pursuant to the high level committee recommendation the aforesaid amalgamation was effected and the post of Senior Technical Assistant and Junior Technical Assistant were re-designated as Insurance Assistant in the pay scale of Rs. 1640-2900.

7.1 Against the said decision of the State various representations were received from the persons manning the post of Senior Technical Assistant. The State after taking into consideration the administrative set up of the office of the Director of Insurance, Recruitment Rules for the post of Senior Technical Assistant and Junior Technical Assistant and the functioning of Senior Technical Assistant and Junior Technical Assistant decided to restore the earlier position and de-merged the cadre and treated it as two separate cadres namely cadre of Senior Technical Assistant and cadre of Junior

Technical Assistant. The benefit of revised pay scale which accrued to the Junior Technical Assistant of drawing their salary in the scale of Rs. 1640-2900 was permitted to be continued by treating the same to be their personal scale and it was resolved that the new incumbents will draw their salary in the pay scale of Rs. 1400-2300 only. In other words it can be said that the pay scale which was revised vide notification dated 20.03.91 was withdrawn. However, the existing JTAs were permitted to continue in the said pay scale and the cadre was de-merged.

8. The petitioner came to be initially promoted to the post of STA with effect from 30.12.99. The petitioner in fact completed 9 years of service in the pay scale of Rs. 1640-2900 on 14.11.94. Now, therefore, the question arises as to whether the petitioner was entitled to avail the benefit of fitment under Rule 41-A(1) of the BCSR and if yes, then from which date. It deserves to be noted that Mr Upadhyay, learned counsel appearing for the petitioner has fairly conceded, as it is recorded hereinabove, that the petitioner is not entitled to receive the benefit of higher pay scale of Rs. 2200-4000 in the scheme promulgated vide resolution dated 05.07.91 and further revised and modified vide resolution dated 16.08.94. However, Mr Upadhyay has submitted that as per

the scheme, the employees eligible for benefit of higher grade scale as per the resolution dated 16.08.94 on completion of 9 years of service were entitled to receive the benefit of fitment of the salary in the higher grade scale as per Rule 41-A(1) of the BCSR. When the employee is actually getting the promotion at that time the fitment benefit is not to be accorded to him as naturally the benefit of fitment cannot be given twice to the employee in the same scale.

8.1 Mr Upadhyay had invited the attention of this Court to clause no. 3(23) of scheme dated 16.08.94 in support of his submission. Mr Upadhyay had also invited the attention of this Court to a decision of this Court (Coram: S.K Keshote, J as he then was) decided in Special Civil Application No. 4730 of 1984 on 17.10.97 wherein the benefit of fitment under Rule 41-A(1) was denied to the petitioner on the ground that when the Civil Judge was appointed as Assistant Judge he was though promoted but was receiving salary in the same pay scale because of the revision of pay scales and therefore the benefit of fitment under Rule 41-A(1) was denied. This Court negated this aspect and directed the State to consider the claim of the petitioner and other similarly situated officers posted as Assistant Judge during the relevant time for grant of one more increment since their

posting as Assistant Judge. It is submitted that now the government has granted them the benefit.

9. The respondents have admitted in the affidavit-in-reply that the employees like the petitioner who were continued in the pay scale of Rs. 1640-2900 were eligible for getting benefit of higher pay scale of Rs. 2200-4000 after their completion of 18 years of service in the scale of Rs. 1640-2900 meaning thereby the applicability of the scheme is not denied to the petitioner. An attempt is made to canvass a submission that as the petitioner who was infact given the scale of Rs. 1640-2900 initially but later on which was withdrawn in case of new recruits cannot claim double benefit. It also deserves to be noted that the scheme of higher grade scale dated 05.07.91 and 16.08.94 do not disqualify such persons like the petitioner from getting benefit of higher pay scale. However, in the present case a peculiar fact occurred and the same deserves to be noted that the revised pay scale of Rs. 1640-2900 granted to the petitioner and other JTAs on merging of the cadre was subsequently withdrawn atleast so far the new recruits were concerned but the petitioner and other JTAs who had actually availed benefit of revision introduced vide notification dated 20.03.91 continued to draw their salary in the pay scale of Rs. 1640-2900 but the salary

drawn in the scale of Rs. 1640-2900 was ordered to be treated as their personal scale and therefore on the basis of this benefit of revised higher grade pay scale under the scheme was not granted to the petitioner as it appears from the record. The petitioner otherwise would have received salary in the scale of Rs. 1400-2300 on withdrawal of the scale as it was withdrawn vide resolution dated 18.10.91.

9.1 It deserves to be noted that the STAs and other similarly situated Assistants in the Secretariat who were receiving their salary in the scale of Rs. 1640-2900 as per the notification dated 20.03.91 did receive the benefit of scheme of higher grade scale envisaged in the resolution dated 05.07.91 which was modified by the resolution dated 16.08.94 and in their case the first revised scale was Rs. 2200-4000. Now this scale as Mr Upadhyay has submitted is actually not permissible in case of the present petitioner and therefore Mr Upadhyay has fairly conceded that the petitioner is not claiming for higher grade scale. It deserves to be noted that the petitioner has infact been promoted to the post of STA with effect from 30.12.99. The respondents have denied the benefit envisaged under Rule 41-A(1) on the ground that as the petitioner is even after his promotion receiving his salary in the same pay scale i.e. Rs.

1640-2900, the benefit of fitment under Rule 41-A(1) cannot be granted.

9.2 Mr Upadhyay has submitted that the benefit of higher grade pay scale envisaged under the scheme of 9, 18 & 27 years promulgated vide resolution dated 05.07.91 and revised vide resolution dated 16.08.94 is denied to the petitioner on the ground that the petitioner is infact benefited as he and other similarly situated JTAs were permitted to draw their salary in the scale of Rs. 1640-2900 despite the demerging effected vide resolution dated 08.10.90. However, the benefit of fitment atleast on completion of 9 years of service in the scale could not have been denied to him or in alternative the benefit of fitment after the petitioner being actually promoted to the post of STA though in the same scale could not have been denied to him. Mr Upadhyay has submitted that in such an anomalous situation in the case of Deputy Director and Joint Director the State has infact rectified it and permitted the benefit of fitment under Rule 41-A(1) of the BCSR and therefore this benefit could not have been denied to the petitioner.

10. The fact remains to be noted that the respondent State has infact issued the resolution dated 17.03.05 in respect of the Deputy Directors and Joint Directors and permitted them the benefit of fitment under Rule 41-A(1) on the ground that though the employees manning these two posts namely the post of Deputy Director and post of Joint Director draw their salary in the same pay scale, the cadre is difficult to be treated as merged and the same is required to be treated as separate cadres and the promotion from the post of Deputy Director would lie to the post of Joint Director and on that basis the benefit of fitment under Rule 41-A(1) of the BCSR is accorded. It is strange that the same reasoning is not applied to the cases of JTAs and STAs as in their case also the cadres which were originally merged vide resolution dated 20.03.91 were demerged and treated as separate cadres vide resolution dated 08.10.91. Thus, on that basis it can now be said that though the persons like the present petitioner in whose case the permission is granted to draw their salary in the scale of Rs. 1640-2900 equivalent to that of STAs considering it to be a personal pay and the promotion of JTAs like the present petitioner is lying to the post of STAs in the same scale the benefit of fitment under Rule 41-A(1) ought not to have been denied to them. Rule 41-A(1) of the BCSR deserves to be set out as under:

"41-A(1) Notwithstanding anything contained in rule 41, where a Government Servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or Officiating capacity to another post involving assumption fro purposes of rule 56- than those attaching to the post held by him in the normal course of promotion or transfer, he will draw as initial pay the stage of the time-scale of the higher post next above the pay notionally arrived at by increasing his Pay in respect of the post held by him by one increment :-

Provided that -

(i)Where the pay of a Government servant in the post held by him immediately before his promotion or appointment to the higher post is at the maximum of the time scale of the post his initial pay in the time scale to the higher post shall be fixed at the stage in that time scale next above such maximum.

(ii)Nothing in this rule shall apply to initial fixation of pay of a Government servant who while he is holding apost in any capacity is appointed to another psot by nomination or recommendation of the Gujarat Public Service Commission or the Departmental Selection Boards or Committee.

(iii)If a Government Servant has either previously held substantively or officiated in :-

(a) the same post; or

(b) a permanent or temporary post on the same time scale or

(c) a permanent post other that a tenure post or a temporary post on an identical time scale the proviso **l** and **ll** to clause (b) of Rule 41 as the case may be shall apply in the matter of initial fixation of Pay and counting of previous service for increment :-"

11. Thus, a perusal of this rule would show that it does

not in any way disqualify the persons drawing personal pay from getting the benefit of fitment envisaged under this rule. It is an admitted position that the responsibility attached to the post of STA is certainly higher than that of JTA and therefore it is always treated to be a promotional post and the promotion of JTA is effected to the post of STA. The existing JTAs like the petitioner were in fact permitted to retain the scale of Rs. 1640-2900 vide resolution dated 08.10.91 whereas the new recruits were to be drawing their salary in the original scale of Rs. 1400-2300.

11.1 The scheme of granting higher grade pay scale to the persons who were stagnating on the same post promulgated vide resolution dated 05.07.91 which was modified by resolution dated 16.08.94 also did not disqualify the employees who were eligible for receiving higher grade pay scale on account of their completion of 9 years of service in the same scale from receiving the benefit of fitment envisaged under rule 41-A(1). In the instant case the petitioner by virtue of resolution dated 08.10.91 could thus be said to have been permitted to remain in the scale of Rs. 1640-2900 though after the resolution the continuation in that scale was to be treated as personal pay and therefore on that basis the petitioner was not treated to be entitled for receiving

one higher grade pay scale.

11.2 Mr Upadhyay has therefore unequivocally given up his claim for receiving higher grade pay scale from the existing pay scale of Rs. 1640-2900 so far as the present petitioner is concerned. The petitioner could not claim benefit of higher grade pay scale from Rs. 1640-2900 when he was JTA as he is receiving benefit of higher grade scale of Rs. 1640-2900 vide resolution dated 20.03.91 though subsequently it was sought to be withdrawn vide resolution dated 08.10.91. However, the said withdrawal did not effect the persons like the existing JTA and they were permitted to draw their salary in the revised pay scale of Rs. 1640-2900 only. This drawing of salary in the revised pay scale of Rs. 1640-2900 which was permitted in the case of existing JTA like the petitioner vide resolution dated 08.10.91 can certainly be said to be a benefit of higher pay scale may be not under the scheme of benefit of higher pay scale but under the scheme of 9, 18 & 27 years. However, because of permission granted to existing JTA like the petitioner to continue to draw their salary in the scale of Rs. 1640-2900, the higher grade pay scale was denied to them and therefore atleast the benefit of fitment under Rule 41-A(1) could not have been denied to them at it did envisage under the scheme of revised higher grade pay

scale.

12. The scheme for benefit of higher grade pay scale contains provision as clause 3(22) & (23), gist whereof could be to the effect that the employees who are eligible to receive the higher grade pay scale under the scheme dated 16.08.94 on completion of 9 years would also be eligible to get benefit of fitment as envisaged under Rule 41-A(1) and when they are actually promoted tot he promotional post in the same scale then the second time they would not get the benefit of fitment under Rule 41-A(1). By virtue of this provision it can be said that the petitioner who was JTA and who was permitted to retain the pay scale of Rs. 1640-2900 and who was on that count said to be not eligible to receive the benefit of still higher grade scale from Rs. 1640-2900 as after the resolution dated 08.10.91, the newly recruited JTAs' scale was only Rs. 1400-2300 be denied the benefit of fitment. Logically speaking one may submit that as the pay scale of Rs. 1640-2900 was permitted to the petitioner and other similar JTAs from 08.10.91 as personal pay the benefit of further revised scale was not granted but then can it be said that though they completed 9 years of service in the scale they were not eligible for fitment on their actual promotion to the post of STA. The denial of fitment under Rule 41-A(1)

even after the petitioner completes 9 years of service and even after he is promoted would be arbitrary and therefore the same woule not be in confirmity with the principles of fairness and therefore the same is violating Articles 14 & 16 of the Constitution of India.

13. It deserves to be noted that on one hand though the petitioner and other similarly situated JTAs were permitted to retain the benefit of drawing their salary in the higher scale of Rs. 1640-2900 from the appropriate date vide resolution dated 08.10.91 and in case of other JTAs the withdrawal was effected though it is a different matter that thereafter no JTA was recruited and infact all the JTAs who received the benefit of higher scale of Rs. 1640-2900 vide resolution dated 20.03.91 were permitted to draw their salary in the same pay scale even after introduction of the resolution dated 08.10.91 wherein the newly recruited JTA those who might have been recruited thereafter were to draw their salary in the pay scale of Rs. 1400-2300. The JTA like the petitioner were not given the benefit of the revised higher grade scale scheme promulgated vide resolution dated 16.08.94 as though the scale of JTA after 08.10.91 had again become the original scale of Rs. 1400-2300 as the benefit of higher grade scale implemented vide resolution dated 20.03.91 was withdrawn. But the JTAs like the petitioner

were permitted to still draw their salary in the revised scale of Rs. 1640-2900 but only on this count can the benefit available under Rule 41-A(1) be denied to them especially when Rule 41-A(1) is not denied even under the scheme also. The answer is an emphatic NO. The petitioner and similarly situated JTAs who were permitted to draw their salary in the revised pay scale of Rs. 1640-2900 are eligible to receive the benefit of fitment from the date they completed 9 years of service in the pay scale of Rs. 1640-2900 and/or from the date they actually were promoted to the post of STA whichever is earlier in point of time.

14. The respondents have placed reliance upon the resolution dated 18.11.99 issued by the Finance Department, State of Gujarat for denying the benefit of fitment envisaged under Rule 41-A(1) of the BCSR to the persons like the present petitioner. The said resolution indicates that the benefit of fitment under Rule 41-A(1) is not to be given as the cadres are to be treated as after introduction of pay revision with effect from 01.01.96. The scale of promotional posts and fidder posts in many cases are same and therefore in such cases these two posts are to be treated as single cadre or these two cadres are to be treated as merged cadres and on that basis the benefit of fitment is not to be

accorded to such employees. This provision could not have been pressed into service for denying the benefit of fitment so far as the persons like the present petitioner are concerned. It deserves to be treated as single cadre and redesignated as Insurance Assistant vide resolution dated 20.03.91. The same has been reconsidered and bifurcated and the original position is restored vide resolution dated 08.10.91 whereunder both the cadres are treated apart and the scales are also different. The persons like the petitioner i.e the existing JTAs were promoted to continue to draw their salary in the scale of Rs. 1640-2900 and it was named as personal pay but this in itself cannot militate against the prayer of the petitioner that the cadres of JTAs and STAs are admittedly separated and different and the promotion from JTA is lying to the cadre of STAs.

15. In the premises aforesaid, the petitions are allowed accordingly. The petitioner is declared to be eligible to receive benefit of fitment under Rule 41-A(1) from his actual completion of 9 years of service in the scale of Rs. 1640-2900 or from the date of his promotion to the post of STA whichever is earlier. The respondents are directed to accord the benefit of fitment to the petitioner from the date he completed 9

years of service in the scale of Rs. 1640-2900 or from the date of his promotion to the post of STA whichever is earlier and all the consequential benefits flowing therefrom. Rule is made absolute accordingly.

(S.R.BRAHMBHATT, J.)

Divya//